No. 20129

United States Court of Appeals
For the Ninth Circuit

INSURANCE COMPANY OF NORTH AMERICA, et al,
Appellants,

vs.

AMERICAN MAIL LINE, LTD.,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE WILLIAM T. BEEKS, *Judge*

BRIEF OF APPELLEE AMERICAN MAIL LINE, LTD.

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ABBREVIATIONS

(CR.....) — Clerk's Record
(CG Tr. .....) — Coast Guard Transcript
(CL ....., CR .....) — Conclusions of Law, Clerk's Record
(FF ....., CR .....) — Findings of Fact, Clerk's Record
(PTO ....., CR .....) — Pre-Trial Order, Clerk's Record
(Cargo Brief .....) — Private Cargo Brief
(Cont. ....., CR .....) — Contention, Clerk's Record
(Cont. Fact ....., CR .....) — Contention of Fact, Clerk's Record
(Cont. Law ....., CR .....) — Contention of Law, Clerk's Record
(Exh. .....) — Exhibit
(Gov. Brief .....) — Government Brief
(Tr. .....) — Reporter's Transcript

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I.
STATEMENT OF THE CASE

A. Background of Private Cargo's Appeal

A further statement of the background of the various proceedings growing out of ISLAND MAIL's casualty will help to understand the present appeal of Insurance Company of North America, et al (hereinafter "Private Cargo") against American Mail Line, Ltd. (hereinafter "Mail Line").

ISLAND MAIL's casualty caused substantial particular average damage to both military cargo owned by the United States of America (hereinafter "Government") and privately owned cargo. Also large general average expenses and sacrifices were incurred by Mail Line and some cargo interests before ISLAND MAIL was able to continue on her voyage; so a general average was declared.

Mail Line ultimately filed a Petition for Exoneration from or Limitation of Liability (Dist. Ct. Adm. No. 16733) in which proceeding claims and answers were filed for particular average damage to cargo by (1) the Government, and (2) the 41 interests constituting Private Cargo, identified as appellants at CR 244-245, who appeal sub nomine Insurance Company of America, et al. When the Government refused to recognize liability for general average, Mail Line commenced litigation seeking its recovery. This was done in the limitation proceeding by a cross-libel against the Government and by a separate suit (Dist. Ct. Adm. No. 16876).

Pivate Cargo which now appeals against Mail Line was jointed by 121 other cargo interests, all identified as appealing libelants at CR 181-186, in bringing suit against the Government (Dist. Ct. Adm. No. 16875) seeking recovery of particular average damage and general average contributions. These cargo interests appeal in No. 20130 sub nomine United Pacific Insurance Company, el al.

When the aggregate of all claims filed in the limitation proceeding did not approach the limitation fund, the District Court exonerated Mail Line's ad interim stipulation (Docket entires 56, 115; CR 6, 9) and treated both Private Cargo's and Government's claims against Mail Line as ordinary libels for cargo damage. (CL 2-3, CR 237). Both the Government's and Private Cargo's particular average claims against Mail Line are subject to the Carriage of Goods by Sea Act (hereinafter "COGSA"), 46 U.S. Code § 1300, et seq. By virtue of the Amended "Jason Clause" (CR 18), the same principles apply to Mail Line's general average claim against the Government.

The Government, while claiming particular average against Mail Line and defending (1) the latter's suit for general average, and (2) Private Cargo's suit for particular average and general average, filed suit (Dist. Ct. Adm. No. 16853) against ISLAND MAIL's pilot, Dewey Soriano (hereinafter "Soriano"), alleging his negligent navigation caused the Government's losses. From the outset of all litigation and through the trial, the Government also vigorously contended ISLAND MAIL was unseaworthy and the condition of her fathometer contributed to her striking the uncharted rock. Its argument was exactly the same now advanced by Private Cargo (Cont. Fact 9, CR 38).

The District Court's decrees dismissed both the Government's and Private Cargos' particular average

suits against Mail Line and awarded the latter recovery of general average, reserving to the Government the right to dispute the amount of contribution should it disagree with the adjustment. The general average adjustment has not yet been completed. Once Mail Line's only antagonist, the Government has not appealed and now accepts the trial court's decision because it asserts, "The proximate cause of the ISLAND MAIL's casualty was the sole negligence of Soriano" (Gov. Brief 113). Neglect of a pilot in the navigation of the ship, of course, is an exception given a carrier by COGSA. 46 U.S. Code § 1304 (2) (a).

Private Cargo's position from the filing of its claim and answer in the limitation proceeding through the trial was, to say the least, anomalous to that now taken in this appeal. Its claim and answer merely alleged "general unseaworthiness, the particulars of which will be determined on discovery" with a reservation of right to amend as additional information became available (Claim § VIII, CR 200). The trial court, upon application of the parties, treated all litigation growing out of ISLAND MAIL's grounding as "protracted". Fifteen pre-trial conferences were held. Extended discovery by way of depositions, production of documents, interrogatories, and requests for admissions of facts was undertaken.

The upshot of the pre-trial procedure was the Pre-Trial Order in which Private Cargo's lack of conviction on

the fathometer was shown by the absence of any affirmative contentions of fact or law that ISLAND MAIL was unseaworthy or her fathometer's condition was a cause of her casualty. Private Cargo's position then was "it does not intend to contest such facts [seaworthiness and lack of proximate cause] at trial by evidence to the contrary" (Cont. 4, CR 35). At the same time Private Cargo asserted ISLAND MAIL was "navigating properly" when her casualty occurred (CF 31, CR 74), that "neither said pilot nor the *ship's operator*, master, officers, or crew had any knowledge of or reason to be aware of the existence or location of the rock involved" (Emphasis added) (CF 32, CR 75), that the stipulated position of the 3.5 rock "was located in an area shown by the Government charts to be safe for the navigation of a ship drawing 29′ 2″ of water under the conditions of weather and tide then obtaining" (CF 34, CR 75), and that "The ten fathom (sixty feet) curve shown on charts pertaining to the area West of Smith Island and any blue shading therein, which indicated the configuration of the ocean floor, did not in themselves constitute a warning to the ISLAND MAIL, with a draft of 29′ 2″ on its Voyage 59 West that said vessel should not navigate in any part thereof" (CF 42, CR 76-77). For the moment we pass mention of Private Cargo's present, similar contentions (Cargo Brief 67-73).

During the trial Private Cargo did not offer any evidence of, or assert any unseaworthiness of ISLAND

MAIL or any proximate cause between the non-operating fathometer and her striking the 3.5 rock. It waived argument on its claim against Mail Line, as did the Government. Immediately after argument, but before decision on the other cases, the trial judge dismissed both the Government's and Private Cargo's particular average claims and granted Mail Line general average from the Government saying:

> "The Court is satisfied that the inoperability of the fathometer did not render the vessel unseaworthy. There were available at all times on the ISLAND MAIL sufficient instruments which, if properly used, could have enabled the pilot or a navigator at any time to precisely locate the position of the vessel" (Tr. 1122).

B. Mail Line Vis-A-Vis Other Litigants

Aside from this appeal against Mail Line, the three other litigants before the Court battle each other. Much is said about causation. Supposed erroneous findings of facts by the trial court are argued very extensively. Since ISLAND MAIL was seaworthy, it is immaterial to Mail Line which theory of causation, or what facts, are adopted, for its exoneration must be granted in any event. *United States v. Los Angeles Soap Co.*, 83 F.(2d) 875, 879 (9 Cir., 1936). We point out, however, that reversals of the findings and conclusions in the other appeals will give Mail Line additional grounds for exoneration. And, as we shall demonstrate, the trial court was not "clearly erroneous" in finding Soriano's negli-

gence was the proximate cause of ISLAND MAIL's striking the 3.5 rock.

Clearly the "gut" issues in the other appeals involve disputed questions of fact, i.e., (1) whether ISLAND MAIL struck the 3.5 rock to make Soriano negligent in the Government's appeal, and (2) whether CHARLES CROCKER struck the same rock in United Pacific, et al's appeal against the Government. Of these disputes, the first presents an inconsistency with what the trial court found in this case. The second was not considered relevant (FF 23. CR 236).

Mail Line, Private Cargo, and the Government, however, stipulated the striking of the 3.5 rock. Private Cargo and the Government both devote much of their briefs to establish this fact independently of the stipulation. If this Court should reject the evidence referred to by Private Cargo and the Government and affirm Soriano's dismissal, the result will be that ISLAND MAIL struck some unidentified and never found rock outside the ten-fathom curve as was found in Soriano's case (FF 22-24, CR 278-279). That result would establish causation due to a "peril of the sea" which is an exemption granted a carrier under COGSA, 46 U.S. Code § 1304 (2) (c). If Soriano is exhonerated because of lack of negligence with a finding that ISLAND MAIL struck the 3.5 rock, Mail Line must be excused also on a "peril of the sea" basis.

Alternatively, the Court could find causation resulted from the Government's negligence in publishing improper charts which were justifiably relied upon by Soriano to the detriment of ship and cargo. This is the real thrust of Private Cargo and is also urged by Soriano. It requires a finding that CHARLES CROCKER in 1952 also struck the 3.5 rock. If she in fact did, the trial judge would have considered the Government negligent. Mail Line, in such an outcome, would receive the exemption provided the carrier of "any other cause arising without the actual fault and privity of the carrier," contained in COGSA, 46 U.S. Code § 1304 (2) (q). Such negligence would extend to Mail Line, as it would to Soriano, regardless of any benefit to Private Cargo, because they do not have to hurdle the questions of reserved sovereign immunity in cases of "agency discretion" and "misrepresentation" argued by the Government.

II.
SEAWORTHINESS

A. Analysis of Private Cargo's Assertions on Unseaworthiness

Private Cargo refers to Knight's "Modern Seamanship" which is not an exhibit. It says that ISLAND MAIL's fathometer was material to her grounding by references to Bowditch "The American Practical Navigator" (Exh. 55) and to isolated remarks of Chief Mate White and Third Mate Gunderson which were stipulated and

agreed to as part of the pre-trial proceedings (CR 88, 100), and not until this appeal, were ever suggested by appellants as evidencing unseaworthiness or proximate cause.

Private Cargo implies ISLAND MAIL's sounding machine would not "pick up" a shoal as she proceeded at her speed of 13 knots, although conceivably a fathometer would have, "if it had been in use". But Private Cargo fails to mention White's testimony under Government cross-examination describing ISLAND MAIL's sounding machine as "an adequate substitute for a fathometer" which could be used at 15 knots (CG Tr. 227-228). Gunderson's testimony was that "If the fathometer had've been working, I doubt very much if it would have been running" (CG Tr. 331).

Captain Andreas S. Einmo said he would use a fathometer only as a "second check" on his bearings. He also testified:

"THE COURT: By the use of an azimuth circle you can obtain accurate bearings and from them accurately calculate your position can you not?

A. Yes, your Honor" (Tr. 365).

Einmo further testified he "always" used radar to establish his position and he explained:

"THE COURT: As a matter of fact, by proper use of a radar bearing you can determine exactly where you are, can't you?

A. Exactly" (Tr. 372).

Reference is made to an occasion Soriano used a fathometer on another vessel to pick up soundings when crossing a ten-fathom curve. Indeed, he did — on a vessel undergoing a builder's "shakedown" for the Navy. That vessel's radar was "out", she was in thick fog, and the Navy's and her builder's representatives wanted to find a specific fathom mark to test her anchor! (Tr. 401). Quite properly an attempt to go into the circumstances of the particular trial trip was rejected by the trial court when objection was made by Government counsel that "What they did with the destroyer WADDELL has nothing to do with this case" (Tr. 773).

Finally, Edmondston's testimony about the Government's method of compiling charts (Tr. 951), a phase of the case in which Mail Line's attorney did not participate, was limited to situations where "if the navigator is using his fathometer he can use the depth curve as an additional feature for fixing his position." The trial court, however, accepted the testimony of navigating witnesses that the use of a fathometer in good weather was not necessary when the vessel had so many other ways to fix her position at any time.

B. Seaworthiness Means Reasonable Fitness

Seaworthiness means that the ship must be reasonably fit for the contracted voyage. She does not have to be perfect, or accident free, or an insurer against loss. Even in personal injury litigation the rule is no different.

Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550, 4 L.ed (2d) 941. 948 (1960).

A few cargo case authorities are: *The SILVIA,* 171 U.S. 462, 464, 43 L.ed. 241, 243 (1898); *In re Gravel Products Corporation,* 24 F.(2d) 702, 703 (2 Cir., 1928); cert. den'd 227 U.S. 347 (1928); *United States Steel Products Co. v. American & Foreign Ins. Co.,* 82 F.(2d) 752, 754 (2 Cir., 1936); *Pillsbury Flour Mills v. Becker,* 49 F.(2d) 648, 650 (W.D.N.Y., 1931); and *President of India v. West Coast Steamship Company,* 213 F. Supp. 352, 356 (D. Ore., 1963), aff'd per curiam 327 F.(2d) 638 (9 Cir., 1964), cert. den'd 377 U.S. 294 (1964).

The cases cited by appellants stand for no more. *Indian Towing Company vs. United States,* 182 F. Supp. 264 (E.D. La., 1959), aff'd 276 F.(2d) 300 (5 Cir., 1960), cert. den'd 364 U.S. 821 (1960), is particularly inappropriate. The tug in *Indian Towing* stranded during high winds. She was not equipped with radar nor a mechanical sounding machine. The only way to sound was by hand lead, which, incidentally, ISLAND MAIL had. The tug's master was "lost" and the mate refused to relieve him after unsuccessfully attempting to establish a position. Presumably there was no effective way to establish a position, but the tug continued on to strand. The case obviously should be limited to its own facts. It does not purport to exact the requirement of a fathometer on all ships in the Merchant Marine.

OVERBROOK, 1932 A.M.C. 719 (S.D.N.Y. 1931), and *Greater New Orleans Expressway Com'r vs. Tug CLARIBEL,* 222 F. Supp 512 (E.D. La., 1963), involved ships with defective compasses, instruments upon which the navigators had to rely exclusively to fix their positions and to steer. Lack of relevancy to ISLAND MAIL with her charts, personnel, and adequate equipment is patent. *The MARIA,* 91 F.(2d) 819 (4 Cir., 1937), would be appropriate if the charts supplied ISLAND MAIL were not current and she was navigated by reliance on them.

Appellants argue that since the fathometer was once operable, it must continue to do so despite alternative and adequate equipment. Our answer is *Louis-Dreyfus v. Paterson Steamships,* 67 F.(2d) 331, 333 (2 Cir., 1933):

> "* * * The ship was seaworthy if she conformed to the requirements of her class and service, even though her owner failed to keep her up to a higher standard which he had gratuitously assumed. The British King (D.C.) 89 F. 872, affirmed on opinion below, 92 F. 1018 (C.A.A. 2)."

Any question about the exercise of due diligence is answered by a vessel being actually seaworthy. This should be self-evident. See *The SILVIA,* supra, 465; *United States v. Los Angeles Soap Co.,* supra, 879; and *American Tobacco Company v. Goulandris.* 173 F. Supp. 140, 168 (S.D.N.Y. 1959), aff'd sub nomine *Lekas v. Drivas V. Goulandris,* 306 F.(2d) 426 (2 Cir., 1962).

C. Island Mail Found Seaworthy

The trial judge, who lived with this case for "a considerable period of time" (Tr. 6), was fully satisfied by ISLAND MAIL's seaworthiness. He found she "was in all respect seaworthy" (FF 8, CR 231), "there is no dispute in the evidence with respect to the seaworthiness of the ISLAND MAIL" (FF 22, CR 236), and "she was in all respects seaworthy and fit for the service for which she was intended" (CL 4, CR 237). Until this appeal Private Cargo has never affirmatively "disputed" seaworthiness.

In the pretrial order Private Cargo agreed that ISLAND MAIL was in all respects seaworthy except as to the fathometer which it did not concede, but about which it did not propose to offer evidence to the contrary. (PTO 4, CR 15 and Cont. 4, CR 35). That agreement was supplemented by the stipulation that "On May 29, 1961, the ISLAND MAIL was equipped with adequate azmuth circles, peloruses, radar, gyro compass repeaters and sextants to locate the vessel's position if used" (Tr. 98). A further stipulation was made that ISLAND MAIL was equipped with an adequate sounding machine in good working order (Tr. 98). When stipulations of evidentiary facts are taken by the court, it may find the ultimate determinative facts from the evidence stipulated and all inferences legitimately to be drawn from them. *Federal Trade Commission v. Pacific States P. T. Asso.*, 273 U. S. 52, 61, 71 L.ed. 534, 538 (1927); *Piedmont*

Canteen Service v. Johnson, 256 NC 155, 123 SE(2d) 582, 91 ALR(2d) 1127.

The statutory requirement for a sounding apparatus, expressed in the alternative of either a mechanical or electronic machine, is found in the provisions of 46 CFR § 96.27-1.

The two agencies of the government most familiar with shipping, the Coast Guard carrying out inspections for the safety of life and property at sea, and the Maritime Administration, which owned and subsidized ISLAND MAIL, were satisfied she was seaworthy. Her Certificate of Inspection (Exh. 31) was unrestricted. The extent of a Coast Guard inspection for seaworthiness purposes is shown in her hull inspection book (Exh. 54). Only a few days before ISLAND MAIL took departure from Seattle she was surveyed and inspected by Maritime Administration Surveyor Frank I. Huxtable whose report went to E. A. MacMichael, Chief, Ship Operations Branch, Pacific Coast District, for the Maritime Administration. Huxtable's survey and MacMichael's letter to Mail Line (Exh. 59) accepted ISLAND MAIL as maintained in accordance with good commercial practice with full knowledge of the fathometer's condition.

White was satisfied the sounding machine was adequate, (CG Tr. 226-227). When Mail Line's counsel proposed to show seaworthiness by adequate equipment on

the Puget Sound voyages only a few days before May 29, 1961, the trial court indicated such evidence would merely be cumulative (Tr. 151).

D. Seaworthiness Does Not Include Negligent Use of Otherwise Adequate Equipement

Seaworthiness requires the carrier to supply a vessel with equipment and navigating data "sufficient to enable a competent man safely to navigate the ship." *The TEMPLE BAR*, 137 F.(2d) 293, 297 (5 Cir., 1943). Note cargo's unsuccessful attack on the sounding machine which was never used when TEMPLE BAR stranded. The general rule is that failure to use navigation data aboard constitutes error in management or navigation rather than unseaworthiness. *United States v. Wessel, Duval & Co.*, 123 F. Supp. 318, 337 (S.D.N.Y., 1954). This Court in *President of India v. West Coast Steamship Company, supra,* approved the following:

> "In examining the facts in this case we must keep in mind that the ship owner's warranty of seaworthiness does not extend to the negligent use of what would otherwise be a seaworthy ship or appliance. *Billeci vs. United States,* 1962 A.M.C. 826, 298 F.(2d) 703 (9 Cir., 1962)." (Page 356 of District Court's Opinion).

We have quoted the trial court's opinion about the sufficiency of navigating instruments which, if properly used, would enable the pilot or a navigator at any time to precisely locate the position of the vessel. By the use of these instruments a navigator could always determine

whether the vessel was in a position to which a prudent navigator would not have taken her. The trial court's finding was they were adequate "to locate the vessel's position if used by the pilot and ship's officers to give a wide berth to any danger to navigation such as to pass westerly of Smith Island (outside the ten-fathom curve)." (FF 8, CR 231).

The western limit of the ten-fathom curve is slightly less than two miles from Smith Island light. In requiring a "wide berth" the trial court accepted the views of witnessess such as Lindholm who testified "any course half mile or more outside the ten-fathom curve should be prudent" (Tr. 116), and Hare who "would say a reasonably prudent course would be about three miles off Smith Island" (Tr. 244), and Einmo who would go "about two and three-quarters miles * * * from the extremity of — from the island." (Tr. 355).

Actually, the "berth" Soriano proposed to give Smith Island was inside the ten-fathom curve for some considerable distance of travel. This can be determined by measuring the distance between the dotted circle for the "wreckage rep. 1952" symbol and the edge of the ten-fathom curve directly to the east — a distance slightly in excess of one-tenth of a mile. Soriano's testimony, however, was:

"Q (By Mr. Fryer) "What I want to know is, what was the berth that you intended to give the wreckage report of 1952 symbol?

A Well, I come around — two-tenths, maybe.

Q Between two and three-tenths of a mile?

A Yes.

Q To the east or to the west?

A To the east." (Tr. 64-65).

From the foregoing it is obvious that ISLAND MAIL's clearance to the east of the "wreckage rep 1952" symbol would have intentionally taken her one to two-tenths of a mile within the ten-fathom curve as she cut across the northwest tip of that particular area shown by a blue tint on all charts. Since the proposed "berth" west of Smith Island was to take ISLAND MAIL within "that definite warning of danger" referred to by Private Cargo, we submit that adding a fathometer to the adequate equipment already available to fix ISLAND MAIL's position would be needless. There was certainly no need for additional equipment "to pick up" any warning presented by the ten-fathom curve when ISLAND MAIL's intended "berth", no matter how fixed, was not wide enough in the first place.

The logical question is, what use was made of ISLAND MAIL's equipment? Captain H. D. Smith, ISLAND MAIL'S master, did not participate in her pre-striking navigation. The mate on watch, Howard Gunderson, did not use the ship's equipment to locate her position on any occasion prior to the striking. His positions were determined by "visual bearings" or estimates of distance. He excused his failure to take bearings on a statement by

Soriano that "he (Soriano) was accustomed to take his own bearings, for himself" (CG Tr. 312).

Soriano did not once establish the vessel's position by the full use of her equipment. On only three occasions during the four hours' trip did he take gyro bearings using the ship's azimuth circles. On those occasions only single gyro bearings were taken. The second, or cross, bearings in each instance were visually taken by "seaman's eye". On all occasions the "distances off" points of land or aids to navigation were determined also by "seaman's eye", although radar was available as another way to fix position and particularly "distances off". These methods were not in accord with the cross bearings obtained by use of azimuth circles on the gyro repeaters considered necessary by the trial court to fix position (Tr. 365).

> "THE COURT: Wouldn't the two bearings taken by use of the azimuth circle enable you to get a definite fix without the use of the visual bearing on Smith Island light?
> A. Yes" (Tr. 452).

The only time bearings using ship's equipment were taken by Soriano during the four hours prior to the grounding were:

Time	Abeam	Nav. Aid	True Bear.	Tr.
1440	Pt. Wilson	Partridge Bank Buoy	328°	418
1500	Partridge Pt.	Partridge Bank Buoy	343°	420
1512	Part. Bank Buoy	Smith Is. Lt.	007°	422-423

After passing Partridge Bank Buoy all beam bearings were taken visually "by looking on the beam" (Tr .29, 30). Bearings ahead were taken by the Kenyon Calculator, an inaccurate device not intended for taking bearings (FF 11, CR 232; FF 11, CR 148). The relative bearings corrected to true bearings were:

Time	Nav. Aid	Rel. Bear.	Gyro	True Bear.	Taken	Tr.
1535	Salm. Bnk.	003° Stb.	335°	338°	Ken.	24-28
	Cattle Pt.	010° Stb.*	335°	345°**	Ken.	25-29
	Smith Is.	090° Stb.	335°	065°	Vis.	25-29
1540	Minor Is.	090° Stb.	350°	080°	Vis.	29-30
	Cattle Pt.	005° Port	350°	345°	Ken.	29-30
	Iceberg Pt.	015 Stb.	350°	005°	Ken.	30

*Described as "approximately" (Tr. 25)

**Described as "probably" (Tr. 25)

Meanwhile, at all times after passing Point Wilson ISLAND MAIL encountered a current towards the east for which no allowance was made (FF 12, CR 233, FF 13, CR 271). Bernard Zetler, Chief of Research Group, Office of Oceanography, U. S. Coast and Geodetic Survey, estimated the currents, within one-quarter knot and possibly varying between the limits of 045° True and 135° True, as follows:

Time	Drift Kts.	Set	Tr.
1440	2.7	115° True	282
1500	2.5	120° True	284
1512	1.2	130° True	284
1535	0.7	090° True	282
1540	0.8	100° True	281

Under these circumstances ISLAND MAIL's course was changed at 1535 from 335° True to 350° True, and again at 1540 by the application of five degrees "right rudder". Both of these course changes, of course, were made on positions for calculations based on the previously mentioned Kenyon Calculator and visual bearings and "seaman's eye" estimates of distances off Smith Island and Minor Island. On the first of these course changes the trial court found Soriano "thought" the vessel was "approximately 2.6 miles" abeam of Smith Island (FF 14, CR 273; FF 12, CR 148); at 1540; at the time of the second course change, Soriano "thought" that Minor Island was "approximately 3.5 miles" abeam (FF 14, CR 273; FF 12, CR 149).

If we accept the 3.5 rock as the one struck, it is clear that the vessel was not in the positions where Soriano "thought" he was at 1535 and 1540. Either his "seaman's eye" bearings and distances on Smith Island and Minor Island were erroneous, or the inaccurate Kenyon Calculator's bearings on the objects about 10 miles ahead were erroneous because ISLAND MAIL could not have traveled

on a course of 350° True for five minutes and then been on a turn to her right for two minutes and still strike the 3.5 rock if she had started from Soriano's positions. The course from his 1540 position to the rock is a 050° True. Yet the actual course at the time of striking according to Helmsman Medeiros was only 355° True (CG Tr. 13, 17-18). At no time between 1535 and 1542 did ISLAND MAIL'S steered course ever take her to the east of where she actually must have been at 1535 or 1540.

The trial court's judgment was that the ISLAND MAIL's casualty was "occasioned by the pilot's failure to fix her position accurately with the means on hand at the times of the aforesaid course changes when an easterly set of the current, for which Soriano did not compensate, would have evidenced itself" (FF 12, CR 233). That finding was exactly like the professional opinion of Commander Conway of the Coast Guard who found CHARLES CROCKER, despite use of a fathometer, was negligently navigated into the ten-fathom curve west of Smith Island and her "grounding was due to failure to take bearings" (Tr. 1053, 1061). His official findings of fact made to the Commandant of the Coast Guard were that "No accurate bearings were taken or other calculations made to determine the exact distance the CROCKER was off Smith Island when Captain Flint commenced to swing the vessel's head to starboard to round Smith Island Lighthouse" (Letter of 11 September 1952, Exh. 40).

III.

PROXIMATE CAUSE

A. Findings of District Court and Private Cargo's Assertions On Proxmiate Cause

The trial judge found the condition of the ISLAND MAIL's fathometer "had nothing to do" with her grounding, "the pilot did not consider it necessary to use the fathometer," and under the existing weather conditions "its use was not necessary" (FF 8, CR 231). Answering the Government's assertion that the condition of the fathometer was subject to the Disputes Clause in the space charter under which military cargo was carried, the trial court found there was "no dispute" about "any need for fathometer" (FF 22, CR 236) and "the non-operation of the fathometer had nothing to do with the striking of the uncharted rock" (CL 9, CR 238). These findings were made with recognition that ISLAND MAIL was "inside the ten-fathom curve" (FF 12, CR 233) and that a safe passage "outside the ten-fathom curve" required "a wide berth" of Smith Island (FF 8, CR 231). All of these findings are in accord with the evidence and the law. They are consistent with Private Cargo's attack on the Government.

Specification of Errors 7 (Cargo Brief 40), following State of Points 20 (CR 192), says the Government's negligence "was *the* proximate cause of the striking of the ISLAND MAIL and loss and damage to her cargo" (Emphasis added). Continuing on, Private Cargo says

either accurate charting of the 3.5 rock, or the placement of a symbol indicating the approximate position of danger "somewhere in the vicinity of the outer edge of the ten-fathom curve * * * clearly would have sufficed to prevent the ISLAND MAIL casualty" (Cargo Brief 55). Further on it says, "an adequate chart would more likely than not have prevented this accident" (Cargo Brief 56).

Private Cargo's inconsistency on the need for a fathometer clearly shows when it argues that the charts aboard the ISLAND MAIL "showed adequate depths, and an absence of other dangers, for a distance of at least 0.4 miles inshore of the track of ISLAND MAIL" Cargo Brief 69), that Soriano was not negligent "to navigate the ISLAND MAIL on the extreme outer edge of the area, 1.87 miles west of Smith Island Light" (Cargo Brief 69), that Government's publications "destroy any basis for finding that the 10-fathom curve is recognized as a danger curve by the Government, or should have been recognized as such by pilot Soriano" (Cargo Brief 70), and "that it was negligence to navigate the ISLAND MAIL on a track 1.87 miles west of the Light, and 486.4 feet inside the outer edge of such area, is unsupported by substantial evidence" Cargo Brief 72).

B. The Requirement of Proximate Cause

Assuming arguendo that ISLAND MAILS's fathometer made her unseaworthy, Private Cargo cannot avoid the findings that the proximate cause of her grounding was not related to such condition. It specifically recognized

the dual requirements of unseaworthiness and proximate cause (Cont. Law 1, CR 79). The cases agree. *The MALCOLM BAXTER JR.*, 276 U.S. 323, 331, 72 L.ed. 901, 904 (1928); *The TEMPLE BAR,* supra, *American Tobacco Company v. Goulandris,* supra; *Levantino v. General Steam Navigation Co., Ltd. of Greece,* 170 F. Supp. 756, 759 (S.D.N.Y., 1959); and *The SAN GUISEPPE,* 1941 A.M.C. 315 (E.D. Va., 1941), aff'd 122 F.(2d) 579 (4 Cir., 1941).

C. Record Evidence of Lack of Proximate Cause of Fathometer to Striking Uncharted Rock

The "Coast Pilot," 1959 Ed. (Exh. 62) on page 221 described navigation on Puget Sound thus:

> "Navigation of these waters is simple in clear weather. The aids to navigation are numerous and the chart is a good guide. In thick weather because of strong and irregular currents etxreme caution and vigilance must be exercised. Strangers should take a pilot."

ISLAND MAIL'S grounding occurred under ideal sea and weather conditions. Soriano described visibility as "abnormal" (Tr. 407). Gunderson said it was "a beautiful day" (CG Tr. 244) and "excellent" (CG Tr. 312). On page 20 of the Government's brief is a list of at least 13 aids to navigation available in the vicinity of Smith Island to fix a navigator's position. The trial judge's judgment that ISLAND MAIL's position could have been accurately fixed at any time, and not navigated where a prudent pilot would not have taken her,

by use of the ship's equipment and without the need of a fathometer is unanimously supported by the record evidence.

ISLAND MAIL's Second Mate Homer W. Gillette accurately fixed the ship's position 0.5 miles off Davidson Rock by use of an azimuth circle for a gyro bearing plus a radar range when she "rounded" that point after the grounding (CG Tr. 192-193).

Third Mate Roy E. Morgan took gyro bearings and "laid them on the chart" when the vessel reached Ship Harbor (CG Tr. 155-156). Gunderson, of course, said the fathometer would not have been "on" even if operable (CG Tr. 331).

Captain George Lindholm, a Puget Sound pilot called as a Government expert on navigation, failed to mention any need for a fathometer. He described his methods to fix a ship's position using three types of equipment: the gyro-repeater and azimuth circle to get bearings, radar to get "range and distance off," and a sextant to verify "distance off" (Tr. 118-119). Lindholm testified that the method of a prudent, careful navigator passing west of Smith Island in good visibility would include use of "a danger bearing" on anything ahead and "if your outside that bearing then your clear" (Tr. 120). He also described a method of determining distance off by a formula related to the relative bearing of an object on a vessel's bow (Tr. 120). His practice is to take his own bearings for the "first round" to make sure the mate

"takes the right thing" (Tr. 127). When going west of Smith Island, Lindholm, even in clear weather, would plot his positions and bearings on the chart (Tr. 142), because he prefers not to rely on his "seaman's eye for any distance like that" (Tr. 143). Lindholm agreed with the Coast Pilots' characterization of navigation in the Smith Island area during clear weather as "simple" (Tr. 148-149).

Captian Abner C. Hare, another Puget Sound pilot called as a Government expert, also completely omitted any reference to any need for a fathometer when piloting in clear weather on Puget Sound. His technique of piloting west of Smith Island is to take bearings with a pelorus or with an azimuth circle instead of using "seaman's eye" because of the danger of the ship getting "set off the track" (Tr. 247). Furthermore, Hare stated that bearings should be taken at "frequent intervals" in all piloting according to authorities and books on navigation (Tr. 254). Hare would put his bearings on the chart or have the mate on watch do so (Tr. 255).

Captain Andreas E. Einmo was the Government's third expert. His navigation method when on a certain course involves the use of "bow bearings on a certain point" (Tr. 359). As a reasonably prudent navigator the bearings he takes he lays on charts (Tr. 360-361). His only use of the fathometer is as a "second check" on his bearings. We have already discussed his recognition of azi-

muth bearings and radar to determine "exactly where you are" (Tr. 365, 372).

Captain Floyd E. Smith, a licensed Puget Sound pilot called on behalf of Soriano, testified how a prudent, experienced pilot would conduct himself on a vessel such as the ISLAND MAIL making the run from Seattle to Bellingham (Tr. 782). As to any need to use a fathometer, Smith testified that there was no reason for a prudent pilot to use a fathometer on a clear day (Tr. 784, 792).

Captain Robert H. Curry, a licensed Puget Sound pilot, was also called on behalf of Soriano. He testified a fathometer is "not necessary" around the west side of Smith Island (Tr. 834-835). Nor is radar needed on a clear day (Tr. 835-836).

And Soriano, the witness most concerned with these appeals, did not consider for a moment that a fathometer was needed.

> "Q Captain, referring back to May 29th on the ISLAND MAIL, did you have any occasion or any reason for using the fathometer on that date?
>
> A Absolutely not" (Tr. 79).

> "Q Captain, with respect to a fathometer, in your experience as a pilot and your procedures that you follow as a pilot have you found it necessary to use a fathometer to determine your position or check your position on a clear day when making a passage through the eastern part of the Strait of Juan de Fuca such as around the west side of Smith Island?
>
> A No" Tr. 485).

IV.

THE EFFECT TO BE GIVEN TO THE FINDINGS OF THE TRIAL COURT

Within the past year, this Court reaffirmed its long established rule that findings of a trial court as to negligence and seaworthiness are not to be upset unless "clearly erroneous". *Walston v. Lambertson,* 349 F.(2d) 660, 663 (9 Cir., 1965), cert. den'd.....U.S.....(1966).

The application of this rule to the present appeal needs no elaboration or explanation. Judge Beeks made findings that ISLAND MAIL was seaworthy, that Soriano was negligent, that the fathometer's condition had nothing to do with her casualty, and that, in any event, under any circumstances the fathometer would not have been used. The closest look at the record fails completely to unearth any evidence by which the trial court's findings in this appeal can be said to be "clearly erroneous."

V.

CONCLUSION

Mail Line submits that those Private Cargo interests which appeal in No. 20129 have completely failed to point out on the record where the trial court in making its findings was clearly erroneous. Thus, these findings, supplemented by the total evidence in all related cases, require affirmation of the District Court.

Mail Line prays that the decree of the District Court dismissing the particular average cargo damage claim of Private Cargo be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing is in full compliance with those rules.

EDWARD C. BIELE
Attorney

APPENDIX I
STATUTES AND REGULATIONS
CARRIAGE OF GOODS BY SEA ACT

Bills of Lading Subject to Chapter

Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter. 46 U. S. Code § 1300.

Duties and Rights of Carrier

Subject to the provisions of section 1306 of this title, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title. 46 U. S. Code § 1302.

Responsibilities and Liabilities of Carrier and Ship — Seaworthiness

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to —

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship; 46 U.S. Code § 1303.

Rights and Immunities of Carrier and Ship — Unseaworthiness

(1) Neither the carrier nor the ship shall be liable for

loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

Uncontrollable Causes of Loss

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from —

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents

or servants of the carrier contributed to the loss or damage. 46 U. S. Code § 1304.

CODE OF FEDERAL REGULATIONS

Subpart 96.27 — Sounding Equipment

§ 96.27 — 1 When required.

(a) All mechanically propelled vessels in ocean or coastwise service of 500 gross tons and over, and all mechanically propelled vessels in Great Lakes service of 1,500 gross tons and over, except paddle wheel vessels, shall be fitted with an efficient mechanical or electronic deep-sea sounding apparatus in addition to the deep-sea hand leads. On Great Lakes vessels, a shallow water alarm may be substituted.